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14 **UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15

16 PEOPLE OF THE STATE OF CALIFORNIA  
17 ex rel. Xavier Becerra, Attorney General of  
18 California,

19 No. 3:17-cv-7106

20 Plaintiff,

21 v.  
22 UNITED STATES DEPARTMENT OF  
EDUCATION and BETSY DEVOS, in her  
23 official capacity as Secretary of Education

24 Defendants.

25 **DEFENDANTS' NOTICE OF MOTION  
AND MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

26 Date: June 4, 2018  
27 Time: 1:30 p.m.  
28 Place: Courtroom A, 15th Floor  
Magistrate Judge Sallie Kim

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## **NOTICE OF MOTION AND MOTION TO DISMISS**

Notice is hereby given that on June 4, 2018, at 1:30 p.m., or as soon thereafter as counsel may be heard, before the Honorable Sallie Kim, in Courtroom A of the 15th Floor of the Philip E. Burton Courthouse and Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102, Defendants will move the Court to dismiss this action.

Defendants move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The basis for this motion is set forth more fully in the following Memorandum of Points and Authorities.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## INTRODUCTION

The U.S. Department of Education (the “Department” or “ED”) loans billions of dollars to students annually to help them cover the costs of attending post-secondary schools. Where a school engages in conduct that would give rise to a cause of action against it under applicable state law, the Department permits a borrower to raise such conduct as a defense against that borrower’s repayment obligation on a Direct Loan (*i.e.*, to raise a “borrower defense” claim). *See* 34 C.F.R. § 685.206(c). If the Department determines that a borrower defense claim is successful, the Secretary of Education (“Secretary”) informs the borrower that s/he is relieved of the obligation to pay all or part of the loan, and the Secretary can also afford the borrower “such further relief as the Secretary determines is appropriate under the circumstances.” *Id.* § 685.206(c)(2).

The regulation governing “borrower defense” was promulgated more than twenty years ago, but was rarely used until 2015. That year, Corinthian Colleges, Inc. (“Corinthian” or “CCI”), announced the closure of all of its schools and filed for bankruptcy. Subsequently, the Department received over 100,000 borrower defense claims from student borrowers who attended Corinthian-operated schools and other institutions. Because the Department determined that CCI had misrepresented its job placement rates, it responded with measures to provide *ad hoc* relief to affected borrowers, simplifying the application process and discharging the associated student loan debt of borrowers who were able to establish that they were aware of and relied on these misrepresentations. At the same time, the Department maintained its discretion to, as provided in

1 the regulation, discharge “all or part” of a loan subject to a successful borrower defense claim and  
 2 provide such other relief as the Secretary deemed appropriate. The Department has been and is  
 3 currently engaged in reviewing, adjudicating, and processing pending borrower defense claims.

4 In this action, the State of California seeks wholesale changes to the Department’s process  
 5 for determining and awarding relief to individual borrowers based on their assertion of a defense  
 6 to repayment. Specifically, it seeks to compel the Department to (1) issue favorable determinations  
 7 awarding full loan discharges to all pending and future borrower defense claimants covered by the  
 8 Department’s findings about Corinthian’s conduct; and (2) set aside a remarkably broad set of  
 9 Department determinations and certifications that certain loans are eligible for collection activity,  
 10 including all loans of borrowers with pending borrower defense claims (whether or not covered by  
 11 the Department’s findings) and all loans of borrowers covered by the Department’s findings  
 12 (whether or not they had actually submitted a defense to repayment of such loans). Plaintiff’s  
 13 claims, however, should be dismissed because Plaintiff, as a state, does not have standing to seek  
 14 this relief on behalf of individual borrowers: It is well-established that a state does not have  
 15 standing as *parens patriae* to bring an action against the federal government.

16 Moreover, Plaintiff fails to state a plausible claim to relief. Claim I generally alleges that  
 17 the Department unreasonably delayed approving pending borrower defense claims. But Plaintiff  
 18 does not even identify which claims it asserts are being unreasonably delayed, and in any event  
 19 does not allege that the Department failed to take any *discrete* action that it is *required* to take. In  
 20 particular, Plaintiff fails to establish that the Department created a “rule” entitling all borrowers  
 21 covered by the Department’s findings to “full relief,” defined by Plaintiff to include a full discharge  
 22 of amounts owed and a refund of any loan amounts already paid. Because the Department created  
 23 no such rule, its asserted failure to not grant “full relief” does not unreasonably delay any discrete  
 24 and mandatory agency action. Claims II and III are similarly dependent on the creation and  
 25 abandonment of this “full relief rule.” But without any binding agency determination entitling  
 26 borrowers on whose behalf Plaintiff purports to bring this suit to such relief, Plaintiff’s allegation  
 27 that the Department unlawfully applied a “revised” “rule” retroactively to borrowers “qualified”  
 28 for relief under the original “rule” (Claim II), and that it failed to “equally” evaluate all borrower

1 defense claims under the original “rule” (Claim III), necessarily fail. In any event, Plaintiff does  
 2 not identify the concrete, discrete agency action – either applying a new “rule” retroactively, or  
 3 treating a new claim “unequally” – that would form the basis of any of these claims.

4 Claims IV and V fare no better. Plaintiff alleges the Department engaged in unlawful  
 5 collection activity with respect to borrowers who submitted borrower defense applications or who  
 6 are covered by the Department’s CCI findings. The Complaint, however, neither identifies any  
 7 particular unlawful collection activity nor plausibly explains why collection activity with respect  
 8 to any of the unidentified borrowers it references would be unlawful. Because the Plaintiff lacks  
 9 standing and fails to state a plausible claim to relief, the Complaint should be dismissed.

10 **BACKGROUND**

11 **I. Statutory and Regulatory Background**

12 **A. The William D. Ford Federal Direct Loan Program And Borrower Defense To  
 13 Repayment**

14 Under Title IV of the Higher Education Act of 1965, as amended (“HEA”), 20 U.S.C. §  
 15 1070 *et seq.*, the Department can enter into an agreement with a post-secondary school that permits  
 16 students to receive federal grants and loans to pay the costs of attending the school. The William  
 17 D. Ford Federal Direct Loan Program, the largest student loan program authorized under Title IV,  
 18 *see* 20 U.S.C. § 1087a *et seq.*, allows students to apply for and receive Direct Loans from the  
 19 federal government to pay their expenses, including tuition and living expenses. *Id.* § 1087ll.

20 While students generally must repay any federal loans received, the HEA carves out  
 21 exceptions and authorizes the Secretary to “specify in regulations which acts or omissions of an  
 22 institution of higher education a borrower may assert as a defense to repayment.” 20 U.S.C.  
 23 § 1087e(h). Pursuant to this authority, the Department codified regulations permitting a borrower,  
 24 “[i]n any proceeding to collect on a Direct Loan,” to “assert as a defense to repayment, any act or  
 25 omission of the school attended by the student that would give rise to a cause of action against the  
 26 school under applicable State law.” 34 C.F.R. § 685.206(c). Such “proceedings” “include, but are  
 27 not limited to,” administrative proceedings for tax refund offset, wage garnishment, salary offset  
 28 for federal employees, and consumer reporting agency reporting. *Id.* §§ 685.206(c)(1)(i)-(iv).

1       The regulation does not set forth any process or timeline for the Department to employ in  
 2 processing or adjudicating claims for borrower defense, and does not provide any standard or  
 3 threshold of proof for the Department to apply in determining whether an asserted basis for  
 4 borrower defense demonstrates “a cause of action against the school under applicable State law,”  
 5 or entitles the borrower to relief. *See, e.g.*, 81 Fed. Reg. 39,330, 39,346 (June 16, 2016) (“2016  
 6 NPRM”) (Department notice of proposed rulemaking recognizing that the existing borrower  
 7 defense regulation “does not provide a process for claims”). Instead, the regulation simply  
 8 provides that when a borrower asserts a “successful” defense against repayment, “the Secretary  
 9 notifies the borrower that the borrower is relieved of the obligation to repay all *or part* of the loan  
 10 and associated costs and fees that the borrower would otherwise be obligated to pay . . . [and] . . .  
 11 affords the borrower such further relief *as the Secretary determines is appropriate* under the  
 12 circumstances.” 34 C.F.R. § 685.206(c)(2) (emphasis added). In addition, the Secretary “may  
 13 initiate an appropriate proceeding to require the school whose act or omission resulted in the  
 14 borrower’s successful defense against repayment of a Direct Loan to pay to the Secretary the  
 15 amount of the loan to which the defense applies.” *Id.* § 685.206(c)(3). The regulation thus  
 16 emphasizes the Secretary’s discretion and speaks in sole terms of the borrower asserting a defense  
 17 against repayment as a prerequisite to securing relief. *Id.* § 685.206(c).

18       **B.       The Department’s Authority To Collect Defaulted Student Loans**

19       Federal law requires that executive agencies “try to collect” any “claim” of the United  
 20 States “arising out of the activities of, or referred to, the agency,” 31 U.S.C. § 3711(a)(1), and  
 21 defines a “claim” as “any amount of funds . . . determined by an appropriate [federal] official of . . .  
 22 to be owed to the United States by a person . . . or entity other than another Federal agency,” *id.* §  
 23 3701(b)(1). Federal agencies are authorized to collect their debts through several tools, including,  
 24 as relevant here, administrative offset, such as tax refund offset, and wage garnishment.

25       With respect to offset, Congress requires federal agencies to refer delinquent nontax debt  
 26 to the Department of the Treasury (“Treasury”) for collection, including through administrative  
 27 offset of federal nontax and tax refund payments. 31 U.S.C. §§ 3716(c)(6), 3720A; 31 C.F.R.  
 28 §§ 285.5(c), (d). Treasury then must offset these payments in order to collect the debt. 31 U.S.C.

1 §§ 3716(c)(1), 3720A(c). To carry out this statutory mandate, Treasury operates a centralized  
 2 Treasury Offset Program (“TOP”), *see* 31 C.F.R. § 285.5(a)(1), through which Treasury matches  
 3 payments to be made to a payee (like benefits payments or tax refunds to be paid from federal  
 4 “payment agencies”) with delinquent debts held by “creditor agencies,” such as ED. *See* 31 C.F.R.  
 5 §§ 285.5(b), 285.5(c)(2), 285.2(b). If there is a match, Treasury pays the offset amount (less any  
 6 fees) to the creditor agency, and sends any remainder to the payee. *See id.* §§ 285.5(f)-(h).

7       In general, the TOP applies to past-due, legally enforceable debts. *See* 31 U.S.C.  
 8 § 3716(c)(6)(A); 31 C.F.R. § 285.5(d). Accordingly, a creditor agency must certify that any debt  
 9 referred to Treasury for collection through administrative offset is, among other things, “[l]egally  
 10 enforceable,” *i.e.*, that “there has been a final agency determination that the debt … is due, and  
 11 there are no legal bars to collection by offset.” *Id.* § 285.5(b). If, for example, a statute or  
 12 regulation explicitly prohibits the collection of a particular debt (such as a debt subject to an  
 13 automatic bankruptcy stay or an administrative review process required by law), then the debt is  
 14 not considered “legally enforceable.” *Id.* Both Treasury and ED regulations set forth procedural  
 15 requirements with which the Department must comply when collecting a debt through offset,  
 16 including providing the debtor with notice and the opportunity, through an administrative review  
 17 process (including a hearing), to contest the legal enforceability of the relevant debt. *See* 31 C.F.R.  
 18 § 285.5(d)(6)(ii); 34 C.F.R. §§ 30.22(b)(3), 30.24, 30.25; *see also* 31 U.S.C. §§ 3716, 3720A.

19       Congress has further authorized agency heads to “garnish the disposable pay” of  
 20 individuals owing to the agency a delinquent nontax debt arising out of a program the agency  
 21 administers. 31 U.S.C. § 3720D; *see also* 20 U.S.C. § 1095a. Before the Department can collect  
 22 a debt through administrative wage garnishment, it must notify the debtor of its intent to do so and  
 23 provide the debtor an opportunity for a hearing concerning the “existence or the amount of the  
 24 debt.” 31 U.S.C. § 3720D(b)(5)(A); *see also* 34 C.F.R. pt. 34 (setting forth Department procedures  
 25 for collecting debt through administrative wage garnishment). “Unless the debtor makes an  
 26 objection or requests a hearing, the Department of Education is authorized to issue an  
 27 [administrative wage garnishment] order that does not exceed 15 percent of the debtor’s disposable  
 28 pay.” *Harrill v. U.S. Dep’t of Educ.*, 2009 WL 230126, at \*6 (S.D. Ohio Jan. 30, 2009).

1           **II. Corinthian's Collapse And The Department's Response**

2           **A.     The Department's Findings Of Misrepresentation At Corinthian**

3           Corinthian was a “publicly traded company operating numerous postsecondary schools that  
 4           enrolled over 70,000 students at more than 100 campuses nationwide.” 81 Fed. Reg. at 39,335.  
 5           In the spring of 2015, in the wake of multiple federal and state investigations into its misconduct,  
 6           Corinthian announced the closure of all of its schools and filed for bankruptcy. *Id.* The  
 7           Department’s investigation concluded that Corinthian systematically misrepresented the rates at  
 8           which its graduates were employed (*i.e.*, its “job placement rates”) across a number of its campuses  
 9           nationwide.<sup>1</sup> Previously, the borrower defense regulation had been “rarely used,” 81 Fed. Reg. at  
 10           39,330, but Corinthian’s collapse “almost immediately produced over 1,000 claims from  
 11           borrowers for a defense to repayment,” U.S. Department of Education, First Report of the Special  
 12           Master for Borrower Defense to the Under Secretary at 5 (Sept. 3, 2015) (“First Special Master  
 13           Report”),<sup>2</sup> a number that has climbed upwards towards 100,000 total claims over the last two years.  
 14           See U.S. Department of Education, Office of Inspector General (“OIG”), *Federal Student Aid’s*  
 15           *Borrower Defense to Repayment Loan Discharge Process* (Dec. 8, 2017) (“OIG Report”).<sup>3</sup>

16           Beginning in 2015, the Department published information on its website about the  
 17           availability of and process for certain CCI borrowers to seek various avenues of relief. See FSA  
 18           Announcement. This includes eligibility information and instructions on how to assert a borrower  
 19           defense, as well as links to lists of Corinthian campuses and academic programs covered by the  
 20           Department’s findings regarding misleading job placement rates (“findings cohorts”). The links  
 21           contain the name of each covered program and a date range to which the findings apply.<sup>4</sup> To

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23           <sup>1</sup> See Notice of Intent to Fine Heald College, April 14, 2015,  
 24           <https://www2.ed.gov/documents/press-releases/heald-fine-action-placement-rate.pdf>; see also  
 25           Federal Student Aid (“FSA”), Information About Debt Relief for Corinthian Colleges Students  
 26           (“FSA Announcement”), <https://studentaid.ed.gov/sa/about/announcements/corinthian> (findings).

27           <sup>2</sup> See <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-1.pdf>.

28           <sup>3</sup> See <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf>.

29           <sup>4</sup> See <https://studentaid.ed.gov/sa/sites/default/files/heald-findings.pdf> (last visited Apr. 24, 2018)  
 30           (listing Heald College programs); <https://studentaid.ed.gov/sa/sites/default/files/ev-wy-findings.pdf> (listing Everest/WyoTech programs).

1 simplify the application process, the Department created “attestation forms”<sup>5</sup> allowing affected  
 2 borrowers in the covered programs to apply for a borrower defense loan discharge by providing  
 3 the program s/he attended, the credential or degree sought, and the dates of attendance, and  
 4 certifying that s/he chose to enroll based, in substantial part, on the school’s advertising materials  
 5 and certain other available information regarding job placement rates.

6 These attestation forms, however, do not specify whether the discharges for which they  
 7 allow borrowers to apply relate to “all” or “part” of the loan the borrower is otherwise obligated  
 8 to pay, 34 C.F.R. § 685.206(c)(2), thus mirroring the Department’s other public statements about  
 9 relief prospectively available to Corinthian borrowers. *See, e.g.*, U.S. Department of Education,  
 10 Fact Sheet: Protecting Students from Abusive Career Colleges (June 8, 2015) (“June 8 Fact  
 11 Sheet”)<sup>6</sup> (CCI borrowers could “receive loan forgiveness” if they established a defense to  
 12 repayment); FSA Announcement; First Special Master Report at 7 (describing FSA’s outreach  
 13 efforts to notify borrowers “that they may be eligible for debt relief based on borrower defense”).

14 **B. The Department’s Processing Of Borrower Defense Applications**

15 Based on these developments, a significantly increased number of student borrowers have  
 16 submitted borrower defense claims in recent years. After receiving fewer than 10 such applications  
 17 prior to 2015, the Department received, in 2016 alone, 77,340 borrower defense applications, and  
 18 another 47,450 in 2017. *See* U.S. Department of Education, Office of Postsecondary Education,  
 19 *Borrower Defense Claims: Data Analysis*, at 6 (Nov. 2017).<sup>7</sup> As of November 2017, the  
 20 Department had resolved over 31,000 of these applications. *Id.* The Department continues to  
 21 review, adjudicate, and process the remaining claims, and on December 20, 2017, announced that  
 22 it had “approved for discharge 12,900 pending claims submitted by former [CCI] students, and  
 23 8,600 pending claims have been denied. This action includes claims that have been received

24  
 25  
 26 <sup>5</sup> *See* <https://borrowerdischarge.ed.gov/FormWizard/RLD/RLDReview.aspx> (displaying  
 attestations for Heald College);

27 <https://borrowerdischarge.ed.gov/FormWizard/RLD/RLDReview.aspx?School=EverestWyoTech> (displaying attestations for Everest/WyoTech).

28 <sup>6</sup> <https://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges>.

<sup>7</sup> *See* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html>.

1 during this administration.” U.S. Department of Education, Improved Borrower Defense  
 2 Discharge Process Press Release (December 20, 2017) (“December Press Release”).<sup>8</sup>

3 Throughout 2015 and 2016, the Department generally awarded full discharges of Direct  
 4 Loan debt to Corinthian borrowers who were able to establish a successful defense to repayment  
 5 based on the Department’s findings. *See, e.g.*, OIG Report at 31-32 (FSA Comments). But as the  
 6 number of borrower defense claims increased, the Department continued to review and adapt its  
 7 evolving process for resolving such claims, first appointing a Special Master to “creat[e] a process  
 8 to evaluate borrower defense claims” and then creating a special “Borrower Defense Unit” within  
 9 its FSA Enforcement Unit. *See* OIG Report at 7-8. And in the December Press Release, the  
 10 Department announced, at the conclusion of a “careful review to ensure a fair and efficient  
 11 process,” an “improved discharge process for borrower defense to repayment claims.” Relief will  
 12 be afforded based on the harm Corinthian borrowers actually incurred as a result of their school’s  
 13 misconduct, measured by comparing average earnings at Corinthian programs with the average  
 14 earnings at comparable programs that the Department determined have met its “gainful  
 15 employment” requirement. December Press Release. The Department announced that remaining  
 16 claims will be “adjudicated systematically under the newly announced discharge process.” *Id.*

17 In addition, the Department has undertaken other efforts to improve the borrower defense  
 18 application process and reduce the burden on affected borrowers. For example, although the  
 19 current borrower defense regulation does not provide for forbearance during the pendency of a  
 20 borrower defense application, *see* 34 C.F.R. § 685.205 (listing the circumstances in which  
 21 forbearance is available), the Department, in an exercise of administrative grace, made such relief  
 22 available to all Corinthian borrowers (and for borrowers already in default, the option to halt  
 23 collection activities). *See* June 8 Fact Sheet; *see also* FSA Enforcement Office, Report on  
 24 Borrower Defense at 2 (Oct. 28, 2016)<sup>9</sup> (once a borrower defense claim is submitted, the  
 25 “borrowers’ loans are placed in forbearance or stopped collection until their claim is resolved,  
 26 unless they opt out”). The Department also decided that it will apply to denied claims a credit for

27  
 28 <sup>8</sup> *See* <https://www.ed.gov/news/press-releases/improved-borrower-defense-discharge-process-will-aid-defrauded-borrowers-protect-taxpayers>.

<sup>9</sup> *See* <https://www2.ed.gov/documents/press-releases/borrower-defense-report.pdf>.

1 amounts approximately equal to the interest that has accrued on a borrower’s subject loans starting  
 2 one year after the borrower defense application was filed. *See* IG Report at 17; December Press  
 3 Release.

4 **III. This Lawsuit**

5 This is an action by the State of California purporting to represent the interests of an  
 6 undefined set of student borrowers in receiving relief from federal student loans borrowed to attend  
 7 Corinthian. To achieve that goal, Plaintiff seeks to displace the Secretary’s discretionary judgment  
 8 as to the relief appropriate to an individual borrower based on a successful defense to repayment  
 9 through a sweeping court order compelling the Department to “approve and grant full relief to all  
 10 pending *and* future borrower-defense claimants” covered by the Department’s job placement rate  
 11 findings, Compl. for Declaratory & Inj. Relief (“Compl.”) at 24, Demand for Relief (B), ECF No.  
 12 1, a number that Plaintiff estimates to include 80,000 student borrowers, *id.* ¶ 42.

13 Plaintiff purportedly seeks relief on behalf of the entire group of borrowers covered by  
 14 what Plaintiff refers to as the “Corinthian Fraud Findings,” (*i.e.*, the Department’s findings  
 15 regarding Corinthian’s misrepresentation of job placement rates for specific “findings cohorts” –  
 16 groups of borrowers who attended certain CCI campuses within certain date ranges), even though,  
 17 by Plaintiff’s estimate, less than half of these students are “Californians.” *Id.* Plaintiff asserts five  
 18 claims, premised largely on the contention that the Department, through its findings and various  
 19 public announcements, created a “rule” prospectively “qualif[ying]” all borrowers covered by  
 20 those findings for “expedited borrower-defense relief,” *id.*, defined by Plaintiff as “complete  
 21 discharge of their federal student loans and refunds of any amounts paid on them,” *id.* ¶ 38.  
 22 Plaintiff argues that the Department is unreasonably delaying the full loan discharge that the “rule”  
 23 requires and, apparently in the alternative, that the Department is unlawfully applying a “revised”  
 24 rule retroactively to borrowers who have already been qualified for full discharges, and  
 25 constructively “denying” pending claims in a manner inconsistent with prior decisions awarding  
 26 full discharges to borrowers in findings cohorts. *See* Compl., Claims I-III.

27 Finally, Plaintiff alleges that the Department is unlawfully engaging in debt collection  
 28 activity against (1) borrowers covered by the “Corinthian Fraud Findings,” under the theory that

1 these borrowers (whether or not they have submitted a borrower defense claim) have “valid  
 2 defenses to repayment” making their loan debts legally unenforceable; and (2) all borrowers with  
 3 pending borrower defense claims, based on the contention that the mere pendency of a borrower  
 4 defense claim renders the underlying debt legally unenforceable. As relief, Plaintiff requests an  
 5 order requiring the Department to vacate any denials of borrower defense claims submitted by  
 6 borrowers in the findings cohorts, approve and grant full relief on all claims submitted by covered  
 7 borrowers (including future claims), and setting aside any Department determination that a loan  
 8 subject to a pending borrower defense claim is legally enforceable (as well as any action to collect  
 9 on any such loan). Plaintiff, however, lacks standing to bring a *parens patriae* action against the  
 10 federal government, and in any case has failed to identify any discrete, mandatory action that the  
 11 Department has either performed unlawfully or failed to perform. Plaintiff’s claims fail as a matter  
 12 of law, and its Complaint should be dismissed.

### 13 **STANDARD OF REVIEW**

14 Defendants move to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules  
 15 of Civil Procedure. “Standing is properly challenged through a Rule 12(b)(1) motion because it is  
 16 ‘a threshold jurisdictional issue.’” *Max Sound Corp. v. Google, Inc.*, 147 F. Supp. 3d 948, 952  
 17 (N.D. Cal. 2015) (citation omitted). As the party invoking federal jurisdiction, Plaintiff “bear[s]  
 18 the burden of showing standing by establishing, *inter alia*, that [it] ha[s] suffered an injury in fact,  
 19 *i.e.*, a concrete and particularized, actual or imminent invasion of a legally protected interest.”  
 20 *Evans v. Wells Fargo Bank, N.A.*, 2013 WL 4049062, at \*2 (N.D. Cal. Aug. 8, 2013) (citation  
 21 omitted); *see also Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 136 F. Supp. 2d 1048,  
 22 1051 (N.D. Cal. 2001). Even if standing exists, the Complaint should be dismissed pursuant to  
 23 Rule 12(b)(6) because it does not contain sufficient factual matter, accepted as true, to “state a  
 24 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

### 25 **ARGUMENT**

#### 26 **I. Plaintiff Lacks Standing To Sue**

27 “Article III of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and  
 28 ‘Controversies,’” and “[t]he doctrine of standing gives meaning to these constitutional limits by

1 ‘identify[ing] those disputes which are appropriately resolved through the judicial process.’” *Susan*  
 2 *B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation omitted). Standing, “which is  
 3 built on separation-of-powers principles, serves to prevent the judicial process from being used to  
 4 usurp the powers of the political branches.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408  
 5 (2013). “Where, as here, a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts  
 6 demonstrating’ each element” of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).  
 7 The “irreducible constitutional minimum of standing” has three elements: that a plaintiff suffer a  
 8 concrete injury-in-fact, that the injury be fairly traceable to the challenged action of the defendant,  
 9 and that it be likely (as opposed to speculative) that the injury will be redressed by a favorable  
 10 decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 560–61 (1992) (internal citations omitted).

11       **A. Plaintiff Lacks Standing To Bring This Action Against The Federal  
 Government As *Parens Patriae***

12       This is a suit on behalf of individuals<sup>10</sup> to compel relief specific to them (namely, to have  
 13 the Department discharge student loan debt and stop collection activity). Simply put, a state does  
 14 not have standing to pursue an action in which it “is only a nominal party without a real interest of  
 15 its own.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Baez*, 458 U.S. 592, 600 (1982).

16       Granted, the “doctrine of *parens patriae* allows a sovereign to bring suit on behalf of its  
 17 citizens when the sovereign alleges injury to a sufficiently substantial segment of its population,  
 18 articulates an interest apart from the interests of particular private parties, and expresses a quasi-  
 19 sovereign interest.” *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011). But  
 20 where a state lacks a “real interest of its own,” and merely “step[s] in to represent the interests of  
 21 particular citizens,” the state does not have standing under the *parens patriae* doctrine. *Alfred L.*  
 22 *Snapp*, 458 U.S. at 600. As indicated above, this is clearly the latter type of suit. The Complaint  
 23 begins by decrying Defendants’ failure to provide “critical, expedited student-loan debt relief to

24  
 25       <sup>10</sup> As noted above, Plaintiff does not appear to limit the population of borrowers on whose behalf  
 26 it seeks relief to California borrowers, noting that the “Corinthian Fraud Findings” apply to  
 27 “approximately 80,000” borrowers in 24 states, only about “38,000” of whom are Californians.  
 28 Compl. ¶ 42. Even if Plaintiff could properly bring claims on behalf of its own residents (which,  
 in this case, it cannot), it has no basis for seeking relief on behalf of *non-resident* student borrowers.  
*See Warth v. Seldin*, 422 U.S. 490, 498 (1975) (Article III standing requires a plaintiff to have “a  
 personal stake in the outcome of the controversy” so as to warrant his invocation of jurisdiction).

1 tens of thousands of students,” Compl. ¶ 1, details how these allegedly unlawful actions harm  
 2 “California Borrowers,” *see id.* ¶¶ 68-72, 82, 89, and seeks relief – *e.g.*, an order compelling the  
 3 Department to approve and grant “full relief” to pending and future borrower defense claimants,  
 4 *see generally* Compl. at 24-25, Demand for Relief – that would exclusively accrue to individual  
 5 borrowers. To the extent Plaintiff seeks to vindicate the interests of private citizens, it fails to  
 6 create any “actual controversy between the State and the defendant,” *Alfred L. Snapp.*, 458 U.S. at  
 7 602, and lacks standing as *parens patriae*. *See also Oregon v. Legal Servs. Corp.*, 552 F.3d 965,  
 8 974 (9th Cir. 2009) (allowing a state to “bring suit on behalf of its citizens solely by virtue of its  
 9 interest that its citizens benefit from voluntary federal grants” would “make the *parens patriae*  
 10 doctrine ‘too vague to survive the standing requirements of Art. III.” (citation omitted)).<sup>11</sup>

11 Perhaps recognizing this fundamental defect, Plaintiff tries to cover its tracks by  
 12 referencing its own interest in “enhance[ing] the wellbeing of California residents by discharging  
 13 the federal loans of California students who have been defrauded,” which Plaintiff asserts is  
 14 “acute” here because the state Attorney General’s Office contributed to the Department’s  
 15 investigation into Corinthian. Compl. ¶ 22. It is well-established, however, that a state “does not  
 16 have standing as *parens patriae* to bring an action against the Federal government.” *Sierra Forest*  
 17 *Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (citation omitted). As the Supreme Court  
 18 has long recognized, “it is no part of [a state’s] duty or power to enforce [it’s] rights in respect of  
 19 their relations with the federal government.” *Massachusetts v. Mellon*, 262 U.S. 447, 485-86  
 20 (1923). To the extent Plaintiff’s action is brought on behalf of its interests in protecting its citizens,  
 21 Plaintiff lacks standing because “the United States, and not the state, represent the people’s  
 22 interests.” *Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670, 676 (7th Cir. 2008).

23 **B. Plaintiff Has Not Alleged Any Direct Injury That Is Actual, Imminent, And  
 24 Traceable To The Department’s Processing Of Borrower Defense Claims**

25 \_\_\_\_\_  
 26 <sup>11</sup> The Ninth Circuit has further recognized that “*parens patriae* standing is inappropriate where  
 27 an aggrieved party could seek private relief.” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652  
 28 (9th Cir. 2017). Such is the case here, as demonstrated by the related *Manriquez* case, a putative  
 class action by a group of student borrowers that largely overlaps with the group of borrowers on  
 whose behalf Plaintiff purports to bring the instant action, and which seeks similar relief. *See*  
*Manriquez v. DeVos*, 3:17-cv-7106 (N.D. Cal.).

1 Even as Plaintiff devotes the beginning, middle, and end of its Complaint to securing loan  
 2 relief on behalf of particular (if unidentified) borrowers, it passingly asserts a direct interest in the  
 3 “enforcement” of the federal borrower defense scheme, insofar as it provides additional remedies  
 4 for violations of state law and deters misconduct by post-secondary schools. Compl. ¶ 22. Initially,  
 5 any assertion of direct harm is undercut insofar as Plaintiff’s requested relief would accrue solely  
 6 to the benefit of individual borrowers (a majority of whom do not even live in California). But in  
 7 any event, Plaintiff’s scarce allegations are insufficient to demonstrate standing.

8 To the extent that Plaintiff’s asserted “interest” describes any injury to the Plaintiff, that  
 9 injury would be inflicted not by the Department, but by institutions of higher education, under the  
 10 apparent theory that they would violate state law at a higher rate if they knew that the Department  
 11 would award full discharges to, or stop collection activity with respect to the loans of, a particular  
 12 set of Corinthian borrowers. But as the Ninth Circuit has recognized, “more particular facts are  
 13 needed to show standing” where, as here, “a plaintiff alleges that government action caused injury  
 14 by influencing the conduct of third parties.” *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir.  
 15 2014) (citation omitted). Here, Plaintiff alleges no facts suggesting the challenged government  
 16 action – generally, delaying approval of pending borrower defense claims submitted by borrowers  
 17 who attended a now-bankrupt school – increases the likelihood that other higher education  
 18 institutions will violate California law in a manner that they otherwise would not have and that  
 19 would inflict concrete, specific harm on the Plaintiff. Plaintiff here does not describe any current  
 20 injury and has failed to explain how any future injury is “certainly impending.” Its allegations of  
 21 harm to its enforcement scheme are therefore “too speculative for Article III purposes.” *Koster*,  
 22 847 F.3d at 654 (citation omitted); *see also Darnensburg v. Metropolitan Transp. Com’n*, 2005 WL  
 23 2277031, at \*7 (N.D. Cal. Sept. 19, 2005).

24 Plaintiff’s final claim to standing, a single sentence alleging that the Department’s “timely  
 25 approval of borrower-defense claims” allows the students whose claims are accepted to access  
 26 additional federal aid and “continue their studies at California’s public colleges and universities,”  
 27 Compl. ¶ 22, is even more speculative. Again, the “injury” is an alleged loss of tuition dollars that  
 28 is premised on the actions of *two* different third parties not before the Court: (1) the hypothetical

1 student borrower who does not take out additional federal loans to attend a particular college, and  
 2 (2) the Corinthian-operated school whose actions allegedly forced this choice upon the  
 3 hypothetical borrower. But Plaintiff alleges *no* facts in support of this speculative claim, much  
 4 less “particular facts” demonstrating how the Department’s alleged failure to grant an unidentified  
 5 set of student borrowers full discharge of their loans has prevented some quantifiable number of  
 6 students from spending money on tuition at state colleges or universities,. Such a purely theoretical  
 7 injury cannot support Article III standing. *See Cohen v. Holder*, 2015 WL 1886553, at \*4 (S.D.  
 8 Cal. Apr. 24, 2015) (rejecting standing argument based on “hypothetical facts”).

9 **II. Claim I Fails To State A Plausible Claim For Unreasonable Delay**

10 A claim under the Administrative Procedure Act (“APA”) to compel agency action  
 11 unreasonably delayed can proceed “only where a plaintiff asserts that an agency failed to take a  
 12 *discrete* agency action that it is *required to take*.” *Norton v. S. Utah Wilderness All.* (“SUWA”),  
 13 542 U.S. 55, 64 (2004). “The agency action must be pursuant to a legal obligation ‘so clearly set  
 14 forth that it could traditionally have been enforced through a writ of mandamus.’” *Vietnam  
 15 Veterans of Am. v. CIA*, 811 F.3d 1068, 1075-76 (9th Cir. 2015) (citation omitted)). In the absence  
 16 of a command to carry out “a ministerial or non-discretionary act,” about which the agency has  
 17 “no discretion whatsoever,” SUWA, 542 U.S. at 63-64, agency action cannot be deemed  
 18 “*unlawfully withheld*,” *id.* at 63, or “unreasonably delayed,” *id.* at 63 n.1. When presented with an  
 19 unreasonable delay claim, “a court does not reach the question of whether a delay was  
 20 unreasonable until it has found that the agency has failed to take a discrete, non-discretionary  
 21 action.” *Cloverdale Rancheria of Pomo Indians of Cal. v. Salazar*, 2011 WL 1883196, at \*3 (N.D.  
 22 Cal. May 17, 2011) (citing SUWA, 542 U.S. at 63 n.1 (“a delay cannot be unreasonable with respect  
 23 to action that is not required”)). Because Plaintiff seeks to compel agency action that is neither  
 24 discrete nor mandatory, Claim I fails as a matter of law.

25 As an initial matter, Plaintiff’s allegations that the Department has “delayed approval of all  
 26 pending borrower-defense claims” for “more than 11 months,” Compl. ¶ 78, and “has not approved  
 27 a single borrower-defense claim” since January 20, 2017, *id.* ¶ 52, are erroneous and contradicted  
 28 by materials cited in the Complaint and in the public record. For example, as noted above, the

1 Department's website (cited in Compl., *e.g.*, ¶¶ 27, 32, 41) contains a press release announcing  
 2 that in December 2017, the Department "approved for discharge 12,900 pending claims submitted  
 3 by former [CCI] students," and that any remaining claims "will be adjudicated systematically."  
 4 December Press Release; *see also* 82 Fed. Reg. 49,114, 49,115 (Oct. 24, 2017) (cited in Compl.  
 5 ¶ 65) (stating that ED "*is continuing* to process borrower defense claims"). To the extent Plaintiff's  
 6 claim is based on the Department's mere failure to process or approve pending claims, Plaintiff  
 7 has failed to *plausibly* allege such failure and the claim should be dismissed. *See Shwarz v. United*  
 8 *States*, 234 F.3d 428, 435 (9th Cir. 2000) (in ruling on a Rule 12(b)(6) motion, court need not  
 9 accept as true "allegations that contradict facts that may be judicially noticed by the court").

10 To the extent Plaintiff instead challenges the Department's delay in awarding the "full  
 11 relief" (*i.e.*, full discharge with refunds for all amounts paid), Compl. ¶ 89, that Plaintiff alleges is  
 12 required by the "rule," the claim still fails because it seeks to compel agency action that is neither  
 13 "discrete" nor that the agency is "required to take." Because Plaintiff does not identify any specific  
 14 borrower whose pending claim has allegedly been delayed (but instead attempts to bring an  
 15 improper *parens patriae* action), its Complaint does not actually allege any particular delay for the  
 16 Court to review – *i.e.*, it fails to identify discrete agency action. Such basic pleading failure  
 17 warrants dismissal. *See SUWA*, 542 U.S. at 64-65 (because a court, under Section 706(1), can only  
 18 compel "discrete agency action," a "broad programmatic attack" that fails to identify "some  
 19 particular agency action that causes [the plaintiff] harm" is precluded (citation omitted)).

20 Moreover, neither the governing statute, applicable regulation, nor the Department through  
 21 less formal means, has established any "rule" requiring the award of any particular form of relief  
 22 to a successful borrower defense claimant, much less a rule imposing a mandatory duty to afford  
 23 the relief that Plaintiff requests. To the contrary, the HEA merely directs the Secretary to specify  
 24 "which acts or omissions of an institution of higher education a borrower may assert as a defense  
 25 to repayment," 20 U.S.C. § 1087e(h), and the regulations promulgated thereunder grant the  
 26 Secretary discretion to determine the appropriate measure of relief. *See* 34 C.F.R. § 685.206(c).

27 Nor has the Department otherwise established a mandatory duty, through any binding  
 28 pronouncement carrying the force of law with respect to future adjudications, to award full

1 discharges to the borrowers on whose behalf Plaintiff purports to bring this suit. *See Ctr. for*  
 2 *Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 21 (D.D.C. 2017) (noting that source of “law”  
 3 creating mandatory duty necessary to sustain a Section 706(1) is limited to agency regulation  
 4 having “force of law” (quoting *SUWA*, 542 U.S. at 64)). It is true, as discussed above, that the  
 5 Department found that certain CCI-operated campuses misrepresented job placement rates at  
 6 specific programs during specific periods of time; and the Department did conduct outreach,  
 7 providing information and simple attestation forms, to assist potentially affected students in  
 8 asserting a borrower defense on that basis. But these efforts were made on an *ad hoc* basis as part  
 9 of the Department’s evolving response to the “flood of borrower defense claims submitted by  
 10 [CCI] students” following its closure, 2016 NPRM, 81 Fed. Reg. at 39,330-331, and it was  
 11 precisely because the existing regulatory scheme lacked a process for asserting borrower defense  
 12 claims that the Department initiated rulemaking in 2016 to “establish a more accessible and  
 13 consistent borrower defense standard and clarify and streamline the borrower defense process,” *id.*

14 To the extent there was any “rule” to govern claims submitted by Corinthian borrowers  
 15 that may be covered by the findings cohorts, it was that such borrowers could establish a defense  
 16 to repayment by attesting to their date of enrollment in a covered program during a covered time,  
 17 as well as their reliance on the relevant campus’ representations regarding job placement rates –  
 18 ground rules that remain in effect. Because the Department’s own findings determined that these  
 19 campuses had engaged in actionable wrongdoing under state law, affected students were relieved  
 20 of their normal obligation to prove their school’s misconduct to establish a borrower defense. *See,*  
 21 *e.g.*, First Special Master Report at 7. But even that determination was never codified through any  
 22 formal agency process, and in any event stopped well short of determining that the appropriate  
 23 remedy for *all* covered Corinthian borrowers, regardless of whether or when they actually submit  
 24 a borrower defense claim, is “complete discharge of their federal student loans and refunds of any  
 25 amounts paid on them.” Compl. ¶ 38. Indeed, the documents that Plaintiff cites make no guarantee  
 26 that all borrowers, including those whose claims have not yet been adjudicated, are entitled to such  
 27 relief. *See* June 8 Fact Sheet (cited in Compl. ¶ 33) (noting that students could “receive loan  
 28 forgiveness,” or were “eligible for borrower defense relief,” in an unspecified amount); First

1 Special Master Report at 7 (cited in Compl. ¶¶ 36, 39) (describing FSA’s outreach efforts to notify  
 2 borrowers “that they may be eligible for [some] debt relief based on borrower defense”); U.S.  
 3 Department of Education, ED Announces Path for Debt Relief for Students at 91 Additional  
 4 Corinthian Campuses (March 25, 2016)<sup>12</sup> (cited in Compl. ¶ 41) (findings gave certain Corinthian  
 5 borrowers a “clear path to loan forgiveness”).<sup>13</sup> In light of the expressly discretionary language in  
 6 the governing regulation, such ambiguous statements are insufficient to create a mandatory duty  
 7 to award “full relief” in future cases.

8 Because a court cannot compel action “not clearly mandated” by law, *Hells Canyon Pres.*  
 9 *Council v. U.S. Forest Serv.*, 593 F.3d 923, 933 (9th Cir. 2010), Plaintiff cannot compel its  
 10 preferred relief. *See CREW v. SEC*, 916 F. Supp. 2d 141, 148-49 (D.D.C. 2013) (“[I]f the duty is  
 11 simply to ‘take action upon a matter’ but ‘the manner of its action is left to the agency’s discretion,’  
 12 the court ‘has no power to specify what the action must be.’” (quoting *SUWA*, 542 U.S. at 64-65)).

13 **III. Claim II Fails To State A Plausible, Reviewable Claim That Any Particular Final**  
**Agency Action Was Invalid Under Section 706(2)**

14 Plaintiff’s second claim is entirely dependent on its assertion that the Department  
 15 established a “rule” entitling all borrowers in job placement rate findings cohorts, including those  
 16 who have not yet had their claims adjudicated (and even those who have not yet submitted claims)  
 17 to full discharges of associated student loan debt. According to Plaintiff, it would be impermissibly  
 18 retroactive to apply any new “revised rule” to borrowers “that the Department has already  
 19 determined are qualified for expedited, full borrower-defense relief.” Compl. ¶ 91. Claim II fails  
 20

21 <sup>12</sup> See <https://www.ed.gov/news/press-releases/us-department-education-announces-path-debt-relief-students-91-additional-corinthian-campuses>.

22 <sup>13</sup> To the extent Plaintiff relies on the Department’s “prior practice,” Compl. ¶ 83, Plaintiff has not  
 23 established that the Department imposed upon itself a mandatory duty to award full discharges in  
 24 all future adjudications involving covered Corinthian borrowers. As discussed above, even as it  
 25 undertook various emergency measures designed to provide *ad hoc* relief to affected borrowers,  
 26 the Department retained (and retains) the discretion under the governing regulatory scheme to  
 27 award either full or partial discharges, as well as to award whatever other relief is appropriate  
 28 under the circumstances, and took no affirmative action to cabin that discretion and bind itself in  
 future adjudications. “Where, as here, the agency’s rule gives it the discretion either to consider  
 or to ignore certain factors, [a court] would be remiss to eliminate this discretion by requiring the  
 agency to *always* ignore certain factors just because it has ‘often’ ignored these factors in the past.”  
*Cal. Trout v. FERC*, 572 F.3d 1003, 1025-26 (9th Cir. 2009).

1 for the simple reason that, as discussed above, the Department did not establish any binding rule  
 2 to limit the Secretary’s discretionary authority or determine in advance that any particular  
 3 borrowers were entitled to “expedited, full borrower-defense relief,” *id.* As such, Plaintiff’s  
 4 assertion that the Department has applied a “new rule” to borrowers that it has “already  
 5 determined” are entitled to full discharge, *id.*, is erroneous and fails as a matter of law.

6 Claim II also fails for the fundamental reason that it does not allege any specific  
 7 “retroactive application”; indeed, it fails to identify an agency action harming a specific borrower  
 8 (much less the state itself. Under the APA, “[o]nly certain agency actions are subject to judicial  
 9 review,” *Sierra Forest Legacy v. U.S. Forest Serv.*, 598 F. Supp. 2d 1058, 1067 (N.D. Cal. 2009),  
 10 and a plaintiff must “identify some ‘agency action’ that affects him in the specified fashion,” *Lujan*  
 11 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882 (1990). Because agency action must be “circumscribed”  
 12 and “discrete,” SUWA, 542 U.S. at 62, a plaintiff cannot “seek wholesale improvements of [a  
 13 federal program] [in court] … rather than in the … [agency] or … Congress, where programmatic  
 14 improvements are normally made,” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. at 891. Even where a  
 15 plaintiff identifies agency action, judicial review is only available over agency action that is  
 16 “final.” *See, e.g., Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006).

17 Plaintiff’s failure to allege that the Department engaged in *any* action at all, which prevents  
 18 the Department from identifying specific challenged action and preparing an administrative record  
 19 that would allow for judicial review over whether that discrete action complied with the  
 20 requirements of the APA, is fatal. *See Friends of the Earth, Bluewater Network Div. v. U.S. Dep’t*  
 21 *of Interior*, 478 F. Supp. 2d 11, 25 (D.D.C. 2007) (“A sure sign that a complaint fails the ‘final  
 22 agency action’ requirement is when ‘it is not at all clear what agency action [plaintiff] purports to  
 23 challenge.’” (citation omitted)). And to the extent Plaintiff relies on the Department’s inaction to  
 24 establish a “constructive repeal of its rule applicable” to the claims of borrowers in the findings  
 25 cohorts, Compl. ¶ 86, this unsupported contention is meritless.<sup>14</sup> Until the Secretary determines

26  
 27 <sup>14</sup> To the extent the Department’s ongoing adjudication of CCI borrowers’ claims is governed by  
 28 anything resembling a “rule,” it is that relief is based on the “improved discharge process” reflected  
 in the December Press Release. In the four months since that press release was issued, Plaintiff  
 has not amended its complaint to challenge any particular application of that process, which

1 the amount of relief a borrower will receive based on a successful borrower defense, she retains  
 2 broad discretion to afford whatever relief is “appropriate under the circumstances,” including  
 3 relieving a borrower of her obligation to repay either “all or part” of a loan. 34 C.F.R.  
 4 § 685.206(c)(2). Within this discretionary scheme, Plaintiff cannot establish that mere inaction  
 5 altered any borrowers’ rights or constituted the “functional equivalent of final agency action.” *Hi-*  
 6 *Tech Pharmacal, Inc. v. FDA*, 587 F. Supp. 2d 1, 10 (D.D.C. 2008); *see also* *Defs. of Wildlife v.*  
 7 *Tuggle*, 607 F. Supp. 2d 1095, 1111 (D. Ariz. 2009) (no final agency action “where the agency  
 8 retains the discretion to accept or reject the challenged action.” (citation omitted)).

9 **IV. Claim III Fails To State A Plausible, Reviewable Claim That Any Particular Final**  
**Agency Action Was Invalid Under Section 706(2)**

10 Claim III suffers from many of the same defects as Claims I and II. Its basic premise is  
 11 that the Department, through unspecified action or inaction, has “constructive[ly] deni[ed]” all  
 12 pending borrower defense claims, which allegedly unlawfully treats borrowers with pending  
 13 applications differently than similarly-situated borrowers who have already received full  
 14 discharges. *Id.* ¶¶ 94-96. As with Claim I, however, Plaintiff makes factual assertions that are  
 15 belied by the public record materials relied upon in the Complaint. Namely, because the  
 16 Department has in fact adjudicated (and approved) some number of the claims Plaintiff alleges  
 17 were pending at the time it filed its Complaint, its contention that any particular claim has been  
 18 “constructively denied” is unfounded. As the Department announced in December, it is continuing  
 19 to adjudicate claims and has not changed its existing criteria for approving claims for borrower  
 20 defense. December Press Release. In light of the Department’s stated intent to consistently  
 21 process and approve claims, Plaintiff has failed plausibly to allege that *all* of the (again  
 22 unidentified) claims pending at the time it filed its Complaint have been constructively denied.

23  
 24 remains beyond the scope of the Complaint. In any event, that process provides for different  
 25 percentages of discharge, including in some instances full discharge, based on the relative average  
 26 earnings of former attendees of particular CCI programs. This methodology, which does not  
 27 eliminate the possibility that some members of the findings cohorts will receive the “full relief” to  
 28 which California believes they are entitled, further undercuts Plaintiff’s assertion that the  
 Department is operating under a “revised rule” to never grant full discharges. And it underscores  
 that ED’s discharge decisions are properly reviewed through actual, identified adjudications rather  
 than in the abstract, based on unidentified borrowers and hypothesized agency actions.

1       Claim III also fails for the same reasons as Claim II. It does not identify any particular  
 2 agency action “denying” any particular claim, nor any particular instance of “unequal treatment”  
 3 that this Court could review.<sup>15</sup> And further, in the absence of any “rule” entitling any borrower  
 4 to a particular measure of relief, Plaintiff fails to establish that any (hypothetical) “disparate”  
 5 treatment of claims – within a regulatory framework that allows the Secretary to award  
 6 discretionary relief to each successful borrower defense claimant based upon what she determines  
 7 is appropriate in the circumstances – is impermissible. Because it does not allege the Department  
 8 has actually “denied” any claims to which it refers (and because the public record contradicts the  
 9 assertion that all such claims have been constructively denied), that the Department has actually  
 10 treated any claims of similarly-situated borrowers “unequally,” or that any such unequal treatment  
 11 would be an impermissible exercise of the Secretary’s discretion, Claim III fails as a matter of law.

12       **V. Claims IV And V Do Not State Reviewable Claims Under Section 706(2) Of The APA**

13       Claim IV is premised on Plaintiff’s assertion that the loans of any borrower with a pending  
 14 defense to repayment claim are legally unenforceable for purposes of administrative and tax refund  
 15 offset, and that the Department has violated Section 706(2) of the APA by submitting the loans of  
 16 “many [such] borrowers,” Compl. ¶ 99, to Treasury for collection through these types of offset.  
 17 Claim V is specific to borrowers in the findings cohorts, and again challenges the Department’s  
 18 submission of “many” of these borrowers’ loans to Treasury for offset. *Id.* ¶ 104. Whether or not  
 19 such borrowers have actually asserted defenses to repayment, Plaintiff asserts that their loans not  
 20 legally enforceable because Plaintiff believes that “the Department is aware that borrowers  
 21 covered by the Corinthian Fraud Findings have valid defenses to repayment.” *Id.* ¶ 105.

22       At the outset it is worth reiterating that, as noted above, *supra* p. 8, the Department places  
 23 loans in “stopped collection” status, or tolls, collection activity while borrower defense  
 24 applications are being processed. But this practice, which is not mandated by any statute or  
 25 regulation, is purely a matter of administrative grace. Within this scheme, Plaintiff’s general  
 26 allegations of “unlawful debt collection” are sorely lacking. The Complaint does not identify any

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<sup>15</sup> To the extent Plaintiff bases this claim on two borrower defense claims that it alleges were  
 28 denied, *see* Compl. ¶ 52, Plaintiff does not explain why they were denied, and thus fails to support  
 its allegation that the Department impermissibly treated similarly-situated claimants differently.

1 particular administrative offset, tax refund offset, or administrative wage garnishment  
 2 determination; nor does it identify any particular borrowers who suffered allegedly illegal  
 3 collection and under what circumstances. Neither Claim IV nor Claim V quantifies the amount of  
 4 alleged unlawful collection activity, other than to cursorily assert that “many borrowers,” though  
 5 unidentified, were affected. Plaintiff’s broad challenges to the Department’s collection actions fail  
 6 because: (1) Plaintiff has failed to identify any concrete, discrete, “agency action” to form the basis  
 7 of a claim under Section 706(2) of the APA; and (2) Plaintiff has not established that any debt  
 8 collection activity against students who had asserted a borrower defense to repayment or who are  
 9 members of a findings cohort is unlawful. The Court should dismiss Claims IV and V.

10 **A. Plaintiff Has Not Identified Any Concrete, Discrete, “Agency Action” Subject  
 11 to Judicial Review Under Section 706(2) Of The APA**

12 Plaintiff again fails, with respect to Claims IV and V to “identify some ‘agency action’ that  
 13 affects [it] in the specified fashion.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. at 882. Notably absent  
 14 from its Complaint are any allegations that would tie any particular instance of collection activity  
 15 to any individual borrower in a manner that would allow the Department to identify a specific  
 16 challenged action and prepare an administrative record that would enable the court to review  
 17 whether or not that discrete agency action complied with the requirements of the APA. *See Ctr.*  
*for Biological Diversity v. U.S. Dep’t of Housing and Urban Dev.*, 241 F.R.D. 495, 502 (D. Ariz.  
 18 2006) (claim that does not identify any particular loan or grant of financial assistance that allegedly  
 19 violated statute, does not adequately challenge a final agency action); *see also Elk Run Coal Co.*  
*v. U.S. Dep’t of Labor*, 804 F. Supp. 2d 10, 31 (D.D.C. 2011) ( allegations that agency made  
 20 unlawful denials, devoid of “identifying facts such as when or by what agency actions such denials  
 21 issues” are insufficient to “identify any discrete, final agency actions that this Court can review”).

22 The only thing close to a specific example of unlawful debt collection in Plaintiff’s  
 23 Complaint is the allegation that “[a]s recently as September 2016, more than 30,000 Corinthian  
 24 students were subject to administrative offset and more than 4,000 to administrative wage  
 25 garnishment.” Compl. ¶ 71. But while showing “collection,” this unadorned allegation says  
 26 nothing about whether such collection was *unlawful*. It does not allege that any of the Corinthian  
 27 students who were subject to collection activity had in fact submitted a borrower defense  
 28

application which was pending at the time of the allegedly unlawful collection activity, were members of a findings cohort, or were exposed to and relied upon CCI's misrepresentations when choosing to enroll. Because Plaintiff has not identified any discrete, reviewable final agency action, as required by the APA, the Court should dismiss Claims IV and V. *See supra* pp. 18-19.

Claim V should also be dismissed as an impermissible programmatic challenge to the manner in which the Department awards relief on borrower defense claims. The theory on which it is based – that even without submitting a borrower defense application seeking such relief, a borrower should obtain full discharge under the Department’s borrower defense regulation any time the Department “is aware” (at least in the estimation of a particular plaintiff) that such a borrower has a valid defense to repayment, such that any loan debt s/he owes becomes legally unenforceable – would turn the Secretary’s borrower defense regulation and process for adjudicating claims on its head. As described further below, that process generally premised relief based on a borrower defense to repayment on the Department’s determination that a particular borrower who has submitted an application is entitled to such relief. In the absence of any such discrete, identifiable agency action to review, the Court risks “embarking on the kind of wholesale, programmatic review of general agency conduct for which courts are ill-suited, and for which they lack authority.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. at 89; *Defs. of Wildlife v. Flowers*, 2003 WL 22143270, at \*1 (D. Ariz. 2003); *Ctr. for Biological Diversity*, 241 F.R.D. at 495.

**B. Plaintiff Does Not Allege That The Department Engaged In Any Unlawful Collection Activity**

Even if Plaintiff had identified specific borrowers who faced collection activity after submitting borrower defense claims, and was not trying impermissibly to impose programmatic reforms, Claims IV and V would still fail because they do not allege unlawful collection activity. Both claims rest upon erroneous premises and would bypass the administrative process established for borrowers to contest debts collected through administrative offset and wage garnishment.

**1. Claims IV and V Erroneously Assume that Collection Activity Must Cease Before the Secretary Determines a Borrower Defense is Successful**

Claim IV assumes that submission of a borrower defense application automatically renders the subject loans “not ‘legally enforceable.’” Claim V further assumes (erroneously) that even

1 where a borrower has not submitted a claim, the Defendants may not certify a debt of that student  
 2 as “legally enforceable” when Defendants are “aware” that the debts are subject to a valid defense  
 3 to repayment. Compl. ¶¶ 105-106. These assumptions ignore the regulatory scheme for borrower  
 4 defense claims, which authorizes the Department to grant discretionary relief to borrowers *who*  
 5 *apply for it* where the *Department determines* that the borrower has a defense to repayment.

6 Contrary to Plaintiff’s assertions, it is not the existence of evidence about a school’s  
 7 wrongdoing or even the Department’s knowledge of that evidence that justifies relief on the basis  
 8 of a borrower defense. Instead, the determination of whether a particular borrower is entitled to a  
 9 discharge on the basis of a defense to repayment is delegated to the Secretary, and is necessarily  
 10 based on the Secretary’s assessment of whether the given borrower has demonstrated that s/he  
 11 personally was harmed by conduct that would give rise to a cause of action under state law. Until  
 12 the Secretary makes these determinations and discharges a particular loan debt, the mere existence  
 13 of a school’s wrongdoing creates no particular “legal bar[] to collection by offset” on the basis of  
 14 borrower defense. *See* 31 C.F.R. § 285.5(b)(“Legally enforceable … means there has been a final  
 15 agency determination that the debt … is due, and there are no legal bars to collection by offset”).  
 16 If the borrower does not “assert as a defense against repayment” a school’s act or omission, then  
 17 the Secretary cannot relieve the borrower of his obligation “to repay all or part of the loan,” 34  
 18 C.F.R. § 685.206(c). Even where the borrower asserts a borrower defense, if the Secretary has not  
 19 yet determined whether that defense is “successful,” the borrower (and much less a state purporting  
 20 to act on his behalf) cannot claim that any effort to collect his debt is unlawful.

21           2. Treasury’s Regulation Does Not Prohibit Collection Activity While a  
Borrower Defense Claim is Pending

22           Claim IV also erroneously alleges that a Treasury regulation prohibits collection of Direct  
 23 Loans that are the subjects of pending borrower defense applications. *See* Compl. ¶ 100. That the  
 24 relevant regulation does not preclude collection of debts that are the subject of pending borrower  
 25 defense applications is evident from the language of the regulation itself and its history.

26           Treasury’s regulation defines “debts that are not legally enforceable” as those “covered by  
 27 a statute that prohibits collection of such debt by offset.” 31 C.F.R. § 285.5(b). Plaintiff has not  
 28 identified any statute prohibiting its alleged collection. Moreover, in explaining that “debts

1 covered by a statute that prohibits collection of such debt by offset” are “not legally enforceable,”  
 2 the regulation provides, as an example, that “if a delinquent debt is the subject of a pending  
 3 administrative review process required by statute or regulation and if collection activity during  
 4 the review process is prohibited, the debt is not considered enforceable.” *Id.* (emphasis added).  
 5 Plaintiff, in selectively relying on this “example,” ignores these requirements, and does not allege  
 6 either that the Secretary’s evaluation of an affirmative borrower defense claim is an  
 7 “administrative review process required by statute or regulation” regarding the validity of the  
 8 underlying debt, or that collection activity during the pendency of this evaluation is prohibited (by  
 9 a source other than the Treasury regulation quoted above).

10 The operative borrower defense regulation contemplates “borrower defenses” to  
 11 repayment being made “in any proceeding to collect on a Direct Loan,” including “[t]ax refund  
 12 offset proceedings” and “wage garnishment proceedings,” 34 C.F.R. § 685.206(c)(1)-(2). This  
 13 does not require ED to consider borrower defenses brought outside the context of such  
 14 “proceedings” and does not establish that review of such free-standing claims is a mandatory  
 15 administrative review process to contest the validity of the underlying debt. Plaintiff points to no  
 16 other statutory or regulatory authority which does. Moreover, the regulation provides for relief  
 17 from payment obligations only if the Secretary determines that “the borrower’s defense against  
 18 repayment is successful.” *Id.* This is inconsistent with Plaintiff’s assertion that collection activity  
 19 is precluded from the time a borrower defense is asserted, rather than from the time the Secretary  
 20 determines the defense is “successful.” The regulation certainly does not prohibit collection  
 21 activity during the pendency of a borrower defense claim. Indeed, the Department recently  
 22 contemplated regulatory action to provide forbearance during such time period, *see* 2016 NPRM,  
 23 81 Fed. Reg. at 39,355-356, which would have been unnecessary if such activity were already  
 24 precluded. Because the Complaint does not identify any borrowers who requested forbearance or  
 25 collection stoppage and were nevertheless subjected to administrative offset or wage garnishment,  
 26 and does not adequately allege unlawful conduct, Claim IV should be dismissed.<sup>16</sup>

27  
 28<sup>16</sup> For the same reason, Plaintiff’s allegation, Compl. ¶ 101, that the Department’s conduct is  
 inconsistent with “agency statements that it will stop collections on the loans of borrower defense

1                   3.    Plaintiff Does Not Allege Administrative Remedies Were Exhausted

2                   As a general matter, a plaintiff must “exhaust all of his or her administrative remedies  
 3 before seeking judicial review.” *Sheikh v. Lynch*, 2015 WL 7731802, at \* 2 (N.D. Cal. Dec. 1,  
 4 2015). Failure to do so is grounds for dismissal, and even where exhaustion is not required by  
 5 statute, courts may “prudentially require exhaustion.” *Id.* “Non-jurisdictional exhaustion serves  
 6 three functions: ‘giving agencies the opportunity to correct their own errors, affording parties and  
 7 courts the benefits of agencies’ expertise, [and] compiling a record adequate for judicial review.”  
 8 *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (citations omitted).

9                   As discussed above, *supra* p. 5, established procedures for administrative review exist for  
 10 individuals to contest the validity of a debt subject to administrative offset or wage garnishment.  
 11 Requiring exhaustion of this review process would afford ED an opportunity to review its  
 12 determination regarding the validity of any challenged debt and correct any error, as well as  
 13 compile an administrative record of materials relevant to its determination, allowing for judicial  
 14 review. It is thus well-established that a plaintiff whose debt has been referred to the TOP must  
 15 have first exhausted administrative remedies before seeking redress in federal court. *See United*  
 16 *States v. Beulke*, 892 F. Supp. 2d 1176, 1187 (D.S.D. 2012); *Ogunmokun v. Am. Educ. Servs.*, 2014  
 17 WL 4724707, at \*5 (E.D.N.Y. Sept. 23, 2014). The Court should decline Plaintiff’s invitation to  
 18 invalidate thousands of unidentified determinations regarding the validity of student loan debts  
 19 without first allowing the agency to employ this established administrative review process.

20                   **CONCLUSION**

21                   For the foregoing reasons, Defendants respectfully request that the Court grant its motion  
 22 and dismiss with prejudice Plaintiff’s Complaint.

23                   Dated: April 24, 2018

24                   Respectfully submitted

25                   CHAD A. READLER  
 26                   Acting Assistant Attorney General

27  
 28 claimants that opt for forbearance” fails to state a claim. Plaintiff has not identified any instance  
 of collection activity violating such statements and so has not alleged any “inconsistent” conduct.

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3

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